

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB -9 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALICIA L.,)	2 CA-JV 2011-0090
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and MAYIA L.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16559400

Honorable Kathleen A. Quigley, Judge Pro Tempore

AFFIRMED

Child and Family Law Clinic

By Paul D. Bennett, a clinical professor appearing
under Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorneys for Appellant Alicia L.

Thomas C. Horne, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee
Arizona Department of Economic Security

B R A M M E R, Judge.

¶1 Alicia L. appeals from the juvenile court’s order terminating her parental rights to her daughter, Mayia L., born October 13, 2009, based on Alicia’s chronic mental deficiency and Mayia’s placement in court-ordered, out-of-home care. *See* A.R.S. § 8-533(B)(3), (B)(8)(c). Alicia argues the Arizona Department of Economic Security (ADES) did not provide sufficient services addressing her mental deficiency or the circumstances causing Mayia to be in out-of-home placement. She also asserts insufficient evidence supported the court’s finding that termination was warranted under either statutory ground. We affirm.

¶2 A juvenile court may terminate a parent’s rights if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent’s rights is in the child’s best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). “[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court’s decision, and we will affirm a termination order that is supported by reasonable evidence.” *Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable

burden of proof.¹ *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶3 The hospital informed Child Protective Services (CPS) of Mayia's birth because Alicia's parental rights to her four other children previously had been terminated.² Believing Alicia could parent Mayia effectively with the aid of services and her mother, CPS allowed Mayia to remain in Alicia's care, arranging for in-home services including a therapist and case manager. One condition of in-home placement, however, was that Mayia's alleged father have no role in parenting.³ Alicia nonetheless allowed contact, leading to domestic violence between Alicia and Mayia's father, and domestic violence between Alicia and her mother. CPS removed Mayia from Alicia's care in late January 2010.

¹Alicia's statement of facts and argument include numerous factual assertions that are not supported with citations to the record. Alicia claims in her reply brief that her citations are sufficient because her arguments are based on a lack of evidence presented by ADES and she cannot cite evidence that "is simply not in the record." This claim is specious. Alicia's brief is rife with affirmative factual assertions that lack citation to the record. We therefore disregard her unsupported assertions and instruct counsel to comply fully with the applicable rules in the future. *See* Ariz. R. P. Juv. Ct. 106(A) (applying Rule 13, Ariz. R. Civ. App. P., to juvenile appeals); Ariz. R. Civ. App. P. 13(a)(4), (a)(6) (appellate brief shall contain references to record in support of recitation of facts and argument); *see also* Ariz. Dep't. of Econ. Sec. v. Redlon, 215 Ariz. 13, ¶ 2, 156 P.3d 430, 432 (App. 2007).

²Alicia's parental rights to her other children were terminated in 2006 on the grounds of time-in-care and Alicia's chronic mental illness or deficiency. We affirmed that termination on appeal. *Alicia L. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2006-0051 (memorandum decision filed May 14, 2007).

³The juvenile court also terminated the parental rights of Mayia's alleged father, who is not a party to this appeal.

¶4 In March 2010, Alicia admitted the allegations in a dependency petition, and the juvenile court approved a case plan of family reunification. Following a March 2010 psychological evaluation, Dr. Dee Winsky diagnosed Alicia with moderate mental retardation, as well as partner and family relational problems based on a history of domestic violence. She opined that “Alicia might in time be able to demonstrate the ability to perform the most basic of parental functions but would need support and supervision in this endeavor” and that the likelihood of success was “weak” due to her cognitive limitations and “long history of inability to successfully progress through case plan services.” Alicia’s case plan instructed her to attend domestic violence and substance abuse groups, as well as parenting classes. ADES also arranged for Alicia to receive therapy from Dr. Dan Overbeck, who had experience working with adults with cognitive disabilities and for a parent aide with similar experience to provide parenting instruction.

¶5 However, Overbeck and Jessica Jordan, who provided parent-child therapy to Alicia, discontinued therapy in late 2010 or early 2011, concluding that continuing therapy would be futile because Alicia had made no meaningful progress and nothing indicated she would make progress with additional therapy. In February 2011, at ADES’s request, the juvenile court changed the case plan to severance and adoption, and ADES moved to terminate Alicia’s parental rights based on § 8-533(B)(3) and (B)(8)(c). After a four-day contested termination hearing held in May and June 2011, the court

found clear and convincing evidence supported both alleged grounds for termination and, by a preponderance of the evidence, that termination was in Mayia's best interests.

¶6 Alicia first asserts ADES provided insufficient services because the services ADES provided did not address the concerns Winsky noted in her evaluation, specifically, that the services did not aid Alicia in coping with her history of domestic violence or her mental retardation. Before seeking to terminate a parent's rights on the grounds of court-ordered, out-of-home placement or a mental illness or deficiency, ADES must make a diligent effort to provide appropriate reunification services—that is, ADES must provide the parent with the time and opportunity to participate in services designed to improve the parent's ability to care for the child. *See* § 8-533(B)(8); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 32-34, 971 P.2d 1046, 1053 (App. 1999); *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994).

¶7 The case plan expressly required Alicia to participate in services that included domestic-violence prevention and anger-management training. Alicia has not cited anything in the record suggesting these services were not made available to her. And, Alicia was supposed to address domestic-violence issues with Overbeck. But Overbeck reported Alicia had not made sufficient progress in her therapy in general, and Alicia testified that she did not discuss her family history with Overbeck because she did not “feel that [her therapy] needs to have anything to do with about other family history[,] . . . it should be just about me and my daughter.” Moreover, in any event, even if ADES

did not provide sufficient services to address Alicia's difficulties with domestic violence, the juvenile court did not terminate her parental rights solely due to those issues, but instead because her cognitive defects prevented her from obtaining the skills necessary to effectively parent Mayia.

¶8 As to Alicia's cognitive difficulties, Overbeck and Jordan were selected to provide services to her because they have specific experience in assisting parents with developmental disabilities. Consistent with Winsky's recommendations, both attempted to help Alicia develop her parenting skills. Alicia has identified no evidence or authority suggesting the therapy provided by Overbeck and Jordan was inadequate, nor that other services were needed to help Alicia effectively parent Mayia in light of her cognitive limitations.

¶9 And, although Alicia asserts Overbeck terminated the therapy prematurely, she again identifies no evidence suggesting further therapy would have been effective in light of Overbeck's and Jordan's determination that Alicia was not making progress. ADES is not required to continue services when it would be futile to do so and instead is required only to "undertake measures with a reasonable prospect of success." *Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053. The juvenile court could rely on Overbeck's and Jordan's determination to conclude that ADES was not obligated to continue to provide services.⁴ *See, e.g., Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231,

⁴Insofar as Alicia contends ADES was not permitted to discontinue services without seeking permission from the juvenile court first, she cites no supporting authority

¶¶ 16-20, 256 P.3d 628, 632-33 (App. 2011); *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, ¶¶ 20-21, 159 P.3d 562, 566 (App. 2007). Alicia cites no authority suggesting otherwise.

¶10 Nor do we agree with Alicia's argument that ADES failed to provide sufficient services as a matter of law merely because it requested from the juvenile court an additional three months of services "to ensure that every effort is made to work with [Alicia]," but nonetheless discontinued services before that three months had elapsed. Alicia's reliance on *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 219 P.3d 296 (App. 2009), is misplaced. That case does not suggest that ADES is bound to continue to provide services it concludes are futile merely because it had requested more time to evaluate whether the services could be effective. Nor does Alicia identify any cogent reason for us to adopt such a rule.

¶11 We also reject Alicia's contention that ADES provided insufficient services because it did not attempt to develop Alicia's mother as part of a support system for Alicia. Winsky noted that a strong support system was necessary for Alicia to be an effective parent, and noted that her mother could possibly provide a portion of that support. But, given the history of domestic violence between Alicia and her mother and

and we do not address this claim. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal). And, although Alicia asserts ADES undermined her efforts by announcing at a meeting that it unilaterally was changing the case plan to severance and adoption, she fails to support this claim with citation to the record, and we do not address it further. *See id.*

Alicia's statement to ADES that she did not wish for Mayia to be placed with her mother, ADES cannot be faulted for declining to provide services to improve that relationship. And ADES otherwise provided an ample support system for Alicia including therapy and parenting instruction. For the reasons stated, we conclude the juvenile court's finding that ADES had provided sufficient reunification services is supported amply by the record.

¶12 Alicia next asserts there was insufficient evidence supporting the juvenile court's finding that termination was warranted pursuant to § 8-533(B)(3) because the evidence did not demonstrate a "present mental condition" that would continue for a prolonged indeterminate period. "To justify severance pursuant to § 8-533(B)(3), ADES must prove that a parent is unable to discharge parental responsibilities because of mental illness, mental deficiency, or chronic substance abuse and that the condition is reasonably likely to continue for a prolonged, indeterminate period." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 2, 53 P.3d 203, 205 (App. 2002).

¶13 The root of Alicia's argument is that Winsky's March 2010 evaluation was not sufficiently current. But Winsky stated in her evaluation that Alicia would be unlikely to be able to overcome her cognitive difficulties and develop adequate parenting skills and testified that Alicia's condition would "continue[] for a prolong[ed,] indeterminate period of time." She also stated Alicia's difficulty with learning adequate parenting skills likely was a result of her cognitive difficulties. Alicia cites no authority,

and we find none, suggesting that ADES must seek another evaluation if there is no indication the previously diagnosed condition had improved.

¶14 Although Winsky opined it was possible Alicia could learn effective parenting techniques despite her cognitive defects, she also opined Alicia was unlikely to be successful. And Overbeck and Jordan stated Alicia had failed to learn adequate parenting skills despite therapy and training. This evidence is sufficient to support the juvenile court's finding termination warranted pursuant to § 8-533(B)(3). We therefore need not reach Alicia's argument that termination was not warranted on time-in-care grounds pursuant to § 8-533(B)(8)(c). *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000).

¶15 We affirm the juvenile court's order terminating Alicia's parental rights to Mayia.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge